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February 13, 2007

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55.

Dear Ms. Dortch:

Level 3 Communications, LLC ("Level 3") urges the Commission to grant Time Warner Cable's ("TWC") Petition for Declaratory Ruling. As Level 3 demonstrated in its Comments and Reply Comments,<sup>1</sup> nothing in Sections 251 and 252 carves wholesale carriers out of the rights granted to requesting carriers under those sections; grant of TWC's Petition is necessary to ensure that consumers throughout the United States enjoy the benefits of competition as intended by the 1996 Act. Further, to give effect to its decision and forestall RLEC efforts to avoid their obligations under Sections 251(a) and (b) and Section 252, the Commission should confirm that the Section 251(f)(1) rural exemption does not relieve RLECs of their obligations under Sections 251(a), 251(b), and 252, including the duty to arbitrate with respect to the Section 251(a) and (b) duties.

Recently, the South Carolina Telephone Coalition ("SCTC") has argued that TWC's Petition should be denied because a grant would invest TWC with "benefits" under Title II.<sup>2</sup> This argument fundamentally misconstrues TWC's Petition, which seeks to reaffirm a wholesale telecommunications carriers' rights under Title II. There is nothing in the statute to support SCTC's novel limitation of Sections 251(a), 251(b), and

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<sup>1</sup> *Comments of Level 3 Communications, LLC In Support of Petition for Declaratory Ruling*, WC Docket No. 06-55 (filed April 10, 2006); *Reply Comments of Level 3 Communications, LLC*, WC Docket No. 06-55 (filed April 25, 2006) ("Level 3 Reply Comments").

<sup>2</sup> *Ex Parte Notice of the South Carolina Telephone Coalition*, WC Docket No. 06-55, Attachment at 8 (filed January 30, 2007).

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252 to apply only to requests for interconnection by retail telecommunications carriers or, in the case of Section 251(b), retail LECs. The Act contains no such qualifier, and thus, according to the plain language of the Act, Section 251(a) and (b) and 252 apply to requests by wholesale, as well as retail, telecommunications carriers. Moreover, the implementation issues that SCTC raises could be addressed in any negotiation and, if necessary, arbitration between the ILEC and the wholesale carrier.

The Western Telecommunications Alliance's ("WTA") recent ex parte correctly recognizes that rights and obligations under Section 251(b) and (c) are intertwined with and inseparable from the arbitration and negotiation provisions of Section 252.<sup>3</sup> As explained by WTA, these provisions apply to all CLECs, and enable CLECs to "enter into Section 251(b) agreements with ILECs."<sup>4</sup> While WTA would prefer that CLECs not sell wholesale services, that anti-competitive position finds no support in the statute or Commission precedent. But what even WTA acknowledges is that the rights and obligations granted under Section 251(b) can be enforced under Section 252.

Section 251(a) unequivocally imposes a duty on all telecommunications carriers to interconnect with other carriers: "Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."<sup>5</sup> Despite this clear language, some RLECs have responded to Level 3's attempts to negotiate interconnection and bring interconnection disputes before state commissions for arbitration by arguing that their Section 251(f)(1) rural exemption frees them from any obligation to negotiate or arbitrate in response to Level 3's requests.

In Washington, for example, CenturyTel argued that Level 3 "cannot make a valid request to negotiate with [CenturyTel] because it is exempt from the provisions of Section 251(c)."<sup>6</sup> The Washington Commission rejected CenturyTel's arguments, explaining that "[t]he rural exemption set forth in 47 U.S.C. 251(f) applies only to the requirements of Section 251(c)" and that "[r]ural companies remain obligated to comply with the provisions of Sections 251(a) and (b)."<sup>7</sup> In Wisconsin, CenturyTel likewise attempted to avoid its interconnection obligations by arguing that the state commission was without jurisdiction to direct it to interconnect with Level 3's network.<sup>8</sup> The state

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<sup>3</sup> *Ex Parte Notice of the Western Telecommunications Alliance*, WC Docket No. 06-55, Attachment at 4 (filed February 6, 2007).

<sup>4</sup> *Id.*

<sup>5</sup> 47 U.S.C. § 251(a)(1).

<sup>6</sup> *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. § 252*, Third Supplemental Order Confirming Jurisdiction, Docket No. UT-023043, at 2 (WUTC Oct. 25, 2002).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin*, Arbitration Award, Wisconsin Public Service Commission, Docket No. 05-MA-130, at 8-13 (Dec. 2, 2002).

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commission resoundingly rejected this argument as well, explaining that Section 251(a)(1) “does not except any carrier from the reach of this provision.”<sup>9</sup>

Unfortunately, not every state commission faced with these arguments has correctly applied the Communications Act. In Colorado, CenturyTel again claimed that the state commission lacked jurisdiction over Level 3’s 251(a) interconnection request, a claim that the commission accepted.<sup>10</sup> Because CenturyTel was not required to negotiate interconnection under Section 251(c) by virtue of its rural exemption, the Commission’s statutory misinterpretation left Level 3 without a means of directly interconnecting with CenturyTel.

Level 3’s experience with CenturyTel was part of a broader business effort to expand the reach of its network into the territories of independent and rural carriers. During a three-month period in 2002, Level 3 made approximately 225 requests for interconnection negotiations under Section 251(a) and (b). Level 3’s intention was to expand the markets available to its ISP customers. (It’s worth noting that in most of the rural territories, the rural carrier also maintained an ISP affiliate that would face competition from Level 3’s customers). Less than 20 percent of the companies engaged in negotiations with only a handful resulting with a non-arbitrated agreement. Most companies simply refused to acknowledge the request for negotiation. Unable to engage the companies in negotiations and unable to spend the money needed to litigate the question with more than 200 companies, Level 3 was forced to dramatically scale back its network expansion efforts.

Level 3 is not the only carrier that has been forced to overcome arguments that the Section 251(f)(1) rural exemption somehow trumps the general duty to interconnect.<sup>11</sup> Indeed, one rural carrier has been so bold as to file a petition for declaratory ruling at the FCC to establish that an exempt rural carrier’s duties under Section 251(a) are not subject

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<sup>9</sup> *Id.*

<sup>10</sup> *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with CenturyTel of Eagle, Inc. Regarding Rates, Terms, and Conditions for Interconnection*, Decision Denying Exceptions, Docket No. 02B-408T, C03-0117, at ¶ 34 (Col. Public Utilities Comm’n Jan. 17, 2003).

<sup>11</sup> *See, e.g., Cambridge Telephone Co. et al. Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief*, Order, Docket No. 05-0259 (Ill. Commerce Comm’n July 13, 2005) (explaining RLECs exempt from Section 251(c) are nonetheless obligated to negotiate terms and conditions for interconnection with requesting telecommunications carrier); (concluding state commission has no arbitration authority over requests to negotiate under Section 251(a)); *Sprint Communications Co. L.P. v. Public Utility Comm’n of Texas*, Case No. A-06-CA-65-SS, Slip Op. 9-10 (W.D. Tex. Aug. 14, 2006) (holding rural exemption allows RLEC to refuse negotiation and arbitration); *see also ExParte Notice of Sprint Nextel*, WC Docket 06-55, at 2 & n.4 (filed January 30, 2007) (detailing RLEC refusals of requests for interconnection under Section 251(a) and for arbitration under Section 252).

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to the negotiation and arbitration procedures specified in Section 252.<sup>12</sup> These efforts delay<sup>13</sup> (and sometimes deny) competition in rural areas, impose unnecessary costs on new entrants, and slow the deployment of advanced services in remote areas, outcomes that are plainly inconsistent with the procompetitive aims of the 1996 Act.

Arguments that Section 251(a) imposes no enforceable interconnection obligation on exempt rural LECs fundamentally misconstrue Sections 251 and 252. As discussed above, Section 251 unambiguously imposes a duty on *all telecommunications carriers*, thus including rural ILECs, to interconnect with other telecommunications carriers. Certain subsections of Section 251 impose additional obligations on particular subclasses of telecommunications carriers. Section 251(b) imposes additional obligations—resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation—on *all* LECs.<sup>14</sup> And Section 251(c) imposes additional obligations—a duty to negotiate, more detailed interconnection requirements, unbundled access, more detailed resale requirements, notice of changes, and collocation—on incumbent LECs.<sup>15</sup> But these Section 251(c) obligations are in addition to the general duty to interconnect, pursuant to Section 251(a). Section 252 provides a mechanism for negotiation, mediation, and arbitration of requests to negotiate made “pursuant to Section 251” — without any limitation to specific subsections of Section 251.<sup>16</sup>

Section 251(f)(1), which exempts rural carriers from Section 251(c) touches only on the issue of *which obligations* enumerated in Section 251 apply to a rural incumbent LEC.<sup>17</sup> It does not in any way limit the authority of a state commission to arbitrate an interconnection dispute pursuant to 252 to implement the still applicable provisions of Section 251(a) and (b). Moreover, a valid Section 251(f)(1) “rural exemption” by its terms does not exempt an incumbent LEC from interconnection obligations under Section 251(a) or (b). In explaining the scope of the rural exemption, the Commission has articulated this limit: “Section 251(f)(1) applies only to rural LECs, and offers an exemption only from the requirements of Section 251(c).”<sup>18</sup>

The Commission should act now to put an end to RLECs’ misplaced arguments. The declaratory relief that Time Warner seeks will have little meaning if a rural LEC can refuse to negotiate interconnection and exchange of traffic with the wholesale CLEC

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<sup>12</sup> *Developing a Unified Inter-carrier Compensation Regime*, Oklahoma Western Telephone Company Petition for Clarification of Declaratory Ruling and Report and Order, CC Docket 01-92 (filed Nov. 27, 2006).

<sup>13</sup> Even where RLECs do not ultimately succeed in denying entry, their reliance on arguments under Section 251(f) without invoking the 251(f) process or being subject to the relevant 251(f) time frames. *See* Level 3 Reply Comments at 10 & n.12 (detailing four years of proceedings before Iowa Utilities Board granted Level 3 authority to provide services to VoIP providers).

<sup>14</sup> 47 U.S.C. § 251(b).

<sup>15</sup> 47 U.S.C. § 251(c).

<sup>16</sup> 47 U.S.C. § 252.

<sup>17</sup> *See* 47 U.S.C. § 251(f)(1).

<sup>18</sup> *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, 7303 (1997).

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serving Time Warner. The states that have considered the issue have split. Consequently, the Commission should make clear for the whole country what the law, in fact, is – that the negotiation and arbitration provisions of Section 252 apply to requests for interconnection under Section 251(a) and (b), including requests made to RLECs subject to the rural exemption under Section 251(f)(1).

For the foregoing reasons, in any Order addressing the TWC Petition, the Commission should make clear that competitive carriers are free to request interconnection from all ILECs, including RLECs, pursuant to Sections 251(a) and (b), and that such requests are subject to the negotiation and arbitration procedures contained in Section 252.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata

*Counsel to Level 3 Communications, LLC*

cc: Thomas Navin, Chief, Wireline Competition Bureau, Federal Communications Commission